Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng'

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NO D5-27-10 OF 1993
KAMALANATHAN RATNAM J
29 JUNE 1998

Shipping and Navigation *— Carriage of goods — Damage and/or loss to goods — Ship was unseaworthy — Damage to cargo caused by ingress of rain and sea water — Whether breach of obligations under Hague Rules — Reliance on exception under art IV r 2(m) (inherent vice) — Whether necessary to show due diligence on the part of the carrier to make vessel seaworthy or cargo holds cargoworthy — Hague Rules arts III rr 1, 2; art IV rr 1, 2(m)*

Shipping and Navigation *— Carriage of goods — Bailment of goods — Whether bailee relationship was established — Whether there was breach of duty to exercise care in and about the loading, storage, custody, care, handling, carriage and discharge of cargo — Contracts Act 1950 ss 104 & 105*

The plaintiffs were the owners of a cargo which was shipped on board the MV Gang Cheng ('the ship') from China to Malaysia. The defendants were the owners of the ship and were at all material times the carriers of the cargo. The plaintiffs claimed for loss and damage arising out of the damage caused to part of its cargo. The plaintiffs argued, inter alia, that: (a) the ship was unseaworthy — relying on the Hague Rules; and (b) the defendants were bailees of the cargo and that they had been in breach of their duty to exercise care in and about the loading, storage, custody, care, handling, carriage and discharge of the cargo — relying on ss 104 and 105 of the Contracts Act 1950. The defendants sought protection under r 2(m) of art IV of the Hague Rules which invokes the defence of inherent vice. It was the case for the defence that where the exception relied upon is art IV r 2(m) (inherent vice), there is no requirement to show due diligence on the part of the defendants to make the vessel seaworthy or the cargo holds cargoworthy. The plaintiffs' expert witness testified that the damage to the cargo was caused by the ingress of rain and sea water into the holds whereas the defendants' expert witness testified that the cause of damage was moisture migration.

Held, allowing the plaintiffs' claim:

(1) The defendants as the owners of the ship and as carriers of the plaintiffs' cargo had breached their obligations under the contract of carriage. They had failed to comply with the provisions of rr 1 and 2 of art III and r 1 of art IV. There was clear breach of r 1 in that, on the evidence, the court found that the ship was not 'seaworthy'. An undertaking that a ship is seaworthy is also a clear undertaking that the ship is fit to transport the cargo. Since

the court had found the ship a dilapidated piece of ironmongery only capable of self-propulsion and unfit to carry the cargo it undertook to transport, the undertaking had been broken (see pp 488F-G, I and 489A–B). In respect of r 2, there was clear breach in the defendants' failure to properly and carefully stow, carry, keep and care for the cargo carried on board the ship such that it would not have been damaged by the ingress of either rain or sea water (see p 489F).

(2) The onus was on the defendants to prove that they had exercised due diligence to render the ship seaworthy within the meaning of the Rules. The court found that no evidence was tendered to show that due diligence was indeed exercised (see p 489H).

(3) The plaintiffs were entitled to rely on bailment as a cause of action on the basis of the defendants' (as shipowner/carriers) attornment as bailees of the cargo by their acknowledgment that the plaintiffs had title to the cargo and were entitled to its delivery. Once a bailee relationship has been established, then it follows that the defendants owe a duty of care to the plaintiffs to deliver the goods on the same good order and condition as they were in, when received by the defendants. In fact, ss 104 and 105 of the Contracts Act 1950 clearly set out the bailee's liability (see p 490D, G).

(4) The defendants had failed to make out a case of moisture migration. The court accepted the evidence of the expert witness that it was not possible for moisture migration to have caused the damage in this case. Even if moisture migration was the cause of the damage to the cargo — which was not the case here — the court could not hold that moisture migration ought to be regarded as an inherent vice of the cargo itself. Moreover, having pleaded reliance on r 2(m) of art IV, no evidence was adduced by the defendants to set up any of the exculpatory provisions relied on. In any case, even if any such evidence relating to the exculpatory provisions was proffered, the immunities provided under art IV of the Hague Rules would not apply if the defendants were in breach of art III r 1 of the Rules (see pp 486D–F, 489I and 490A–B).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan pemilik kargo yang diangkut atas MV Gang Cheng ('kapal tersebut') dari China ke Malaysia. Defendan-defendan merupakan pemilik kapal tersebut dan pada semua masa material merupakan pengangkut kargo. Plaintif-plaintif menuntut kerugian dan kerosakan yang berbangkit daripada kerosakan yang disebabkan kepada sebahagian kargonya. Plaintif-plaintif berhujah, antara lain, bahawa: (a) kapal tersebut tak layak layar — dengan bergantung pada Kaedah-Kaedah Hague; dan (b) defendan-defendan adalah baili kargo dan bahawa mereka telah melanggar kewajipan mereka untuk berjaga-jaga dalam dan mengenai pemunggahan,

penyimpanan, jagaan, kawalan, pengurusan, pengangkutan dan pelepasan kargo — dengan bergantung pada ss 104 dan 105 Akta Kontrak 1950. Defendan-defendan meminta perlindungan di bawah k 2(m) perkara IV Kaedah-Kaedah Hague yang menggunakan pembelaan kecacatan yang sedia ada. Ia merupakan kes pembelaan bahawa di mana kekecualian yang diharapkan adalah perkara IV k 2(m) (kecacatan yang sedia ada), tiada keperluan untuk menunjukkan usaha wajar pada pihak defendan-defendan untuk menjadikan kapal layak layar atau palka kargo layak memuat kargo. Saksi pakar plaintif-plaintif memberi keterangan bahawa kerosakan kepada kargo adalah disebabkan kemasukan air hujan dan air laut ke dalam palka manakala saksi pakar defendan-defendan memberi keterangan bahawa punca kerosakan adalah migrasi lembapan.

Diputuskan, membenarkan tuntutan plaintif-plaintif:

(1) Defendan-defendan sebagai pemilik kapal dan sebagai pengangkut kargo plaintif-plaintif telah melanggar tanggungjawab mereka di bawah kontrak pengangkutan. Mereka telah gagal mematuhi peruntukan-peruntukan kk 1 dan 2 perkara III dan k 1 perkara IV. Jelas terdapat kemungkiran k 1 dalam ertikata, atas keterangan, mahkamah mendapati bahawa kapal tersebut tak 'layak layar'. Akujanji bahawa sesebuah kapal layak layar juga merupakan akujanji yang jelas bahawa kapal itu layak mengangkut kargo. Oleh kerana mahkamah telah mendapati kapal tersebut adalah benda buatan besi yang kopak-kapik dan tidak layak mengangkut kargo ia berakujanji untuk mengangkut, akujanji itu telah dipecah (lihat ms 488F–G, I dan 489A–B). Berkenaan dengan k 2, jelas terdapat kemungkiran dalam kegagalan defendan-defendan untuk menyimpan, mengangkut, menyimpan dan mengawasi kargo yang diangkut atas kapal tersebut secara wajar dan berhati-hati agar ia tidak dirosakkan oleh kemasukan air hujan atau air laut (lihat ms 489F).

(2) Beban terletak pada defendan-defendan untuk membuktikan bahawa mereka telah melaksanakan usaha wajar untuk menjadikan kapal tersebut layak layar dalam lingkungan maksud Kaedah tersebut. Mahkamah mendapati bahawa tiada keterangan telah dikemukakan untuk menunjukkan bahawa usaha wajar memang telah dilaksanakan (lihat ms 489H).

(3) Plaintif-plaintif berhak bergantung kepada bailmen sebagai satu kausa tindakan berdasarkan 'attornment' defendan-defendan (sebagai pemilik kapal/pengangkut) sebagai baili kargo menerusi pengakuan mereka bahawa plaintif-plaintif mempunyai hakmilik kepada kargo dan berhak menerima penyerahannya. Sebaik saja hubungan baili dibuktikan, maka ia bermakna bahawa defendan-defendan mempunyai kewajipan berjaga-jaga terhadap plaintif-plaintif untuk menyerahkan barangan dalam keadaan sempurna, seperti yang diterima oleh defendan-defendan. Pada hakikatnya, ss 104 dan 105 Akta Kontrak 1950 dengan jelasnya menyatakan liabiliti baili (lihat ms 490D, G).

(4) Defendan-defendan telah gagal mengemukakan hujah migrasi lembapan. Mahkamah menerima keterangan saksi pakar bahawa adalah tidak mungkin untuk migrasi lembapan menyebabkan kerosakan dalam kes ini. Kalaupun migrasi lembapan adalah punca kerosakan kepada kargo — yang bukannya kes di sini — mahkamah tidak boleh memutuskan bahawa migrasi lembapan patut dianggap sebagai kecacatan yang sedia ada pada kargo sendiri. Tambahan pula, setelah memplidkan pergantungan pada k 2(m) perkara IV, tiada keterangan telah dikemukakan oleh defendan-defendan untuk mengemukakan mana-mana peruntukan pembebasan yang diharapkan. Walau bagaimanapun, sekalipun keterangan demikian yang berkaitan dengan peruntukan pembebasan dikemukakan, kekebalan yang disediakan di bawah perkara IV Kaedah-Kaedah Hague tidak terpakai sekiranya defendan-defendan melanggar perkara III k 1 Kaedah tersebut (lihat ms 486D–F, 489I dan 490A–B).]

Notes

For cases on carriage of goods, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1013–1209.

Cases referred to

Christel Vinnen, The [1924] P 208 (refd)
Good Friend, The [1984] 2 Lloyd's LR 586 (refd)
Gudermes, The [1993] 1 Lloyd's Rep 311 (refd)
Maxine Footwear Co Ltd & Anor v Canadian Government Merchant Marine Ltd [1959] AC 589 (refd)
Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd [1979] AC 580 (refd)
Soya GmbH Mainz Kommanditgesellschaft v White [1983] 1 Lloyd's Rep 122 (refd)

Legislation referred to

Bills of Lading Act 1855 [UK] s 1
Civil Law Act 1956 s 5(1)
Contracts Act 1950 ss 104, 105
Courts of Judicature Act 1964 s 24(b)
Evidence Act 1950 ss 45, 46
Rules of the High Court 1980 O 40 r 1(1), O 59 r 19
Hague Rules arts III rr 1, 2, art IV rr 1, 2(m), art III r 1(c)
Supreme Court Act 1981 [UK] s 20

Darryl Goon (*Ng Sai Yeang* with him) (*Raja Darryl & Loh*) for the plaintiffs.

Arun Khrishnalingam (*Shearn Delamore & Co*) for the defendants.

Cur Adv Vult A

Kamalanathan Ratnam J:

The facts

This is an action in rem by the plaintiffs against the MV Gang Cheng. The B
actual plaintiffs are Sin Heng Chan (S) Pte Ltd, a company incorporated in the Republic of Singapore. The plaintiffs are the owners of 13,147.50 metric tons of Chinese yellow maize ('the cargo') which were shipped in bulk on board the MV Gang Cheng from Dalian in China to Malaysia.

Upon arrival in Malaysia, part of the cargo was delivered at Kuantan C
Port while the balance was delivered at Port Klang.

The defendants are the owners of the MV Gang Cheng and were at all material times the carriers of the said cargo.

The case for the plaintiffs D

The plaintiffs' claim is for damages for loss and damage arising out of the damage caused to part of its cargo. The plaintiffs contend that as consignees and endorsees of the bill of lading in question and as the owners of the cargo, they are entitled to sue the defendants for breach of the contract of carriage as evidenced by the bill of lading. Relying on the Hague Rules, the E
plaintiffs contend that the MV Gang Cheng was unseaworthy. The plaintiffs also contend that in any event — the MV Gang Cheng being a common carrier for reward — the defendants are therefore bailees of the said cargo and that they have been in breach of their duty as such to exercise care in and about the loading, storage, custody, care, handling, carriage and F
discharge of the said cargo. They relied on ss 104 and 105 of the Contracts Act 1950 ('the Act'). The plaintiffs also relied on negligence and contended that the defendants had breached the ordinary common law duty of care owed to the plaintiffs in respect of the said cargo.

The case for the defence G

The defendants on the other hand do not admit any of the plaintiffs' contentions except that the charter party is subject to the Hague Rules. They rely on art IV r 2 of the Hague Rules and contend that the damage to the cargo was occasioned by certain excepted perils under the Hague H
Rules.

The court's findings

The relevant laws applicable I

Section 24(b) of the Courts of Judicature Act 1964 deals with the court's jurisdiction and authority in respect of admiralty matters. The said section reads:

A Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include —

(a) ...

(b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981; ... .

B

Section 20 is the relevant section of the United Kingdom Supreme Court Act 1981 and it reads:

(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say —

C (a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2); ...

(2) The questions and claims referred to in subsection (1)(a) are —

...

(g) any claim for loss of or damage to goods carried in a ship; ... .

D

The Hague Rules

It is common ground that the terms of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 25 August 1924, called the Hague Rules, apply to this case. This E is expressly set out in the conditions of carriage on the reverse of the bill of lading dated 13 March 1993 under 'general paramount clause'. It is obvious that the question of liability or otherwise on the part of the defendants is based on the contract of carriage, and which is evidenced by the bill of lading, and the terms of that contract are set out on the reverse F of the bill of lading incorporating the Hague Rules. The relevant Rules applicable to this case are rr 1 and 2 of art III and also r 1 of art IV of the Hague Rules as relied on by the plaintiffs and these read as follows:

Article III

1 The carrier shall be bound, before and at the beginning of the voyage G to exercise due diligence to —

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their H reception, carriage and preservation.

2 Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Article IV

I 1 Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in

which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

The defence relies on the relevant subrules to r 2 of art IV which reads:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —

...

(c) perils, dangers and accidents of the sea or other navigable waters.

...

(i) act or omission of the shipper or owner of the goods, his agent or representative.

...

(m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.

...

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

United Kingdom Bills of Lading Act 1855

Section 5(1) of our Civil Law Act 1956 ('CLA') reads as follows:

Application of English law in commercial matters

In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to the mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.

The relevant English provision that is applicable pursuant to s 5(1) of the CLA is s 1 of the United Kingdom Bills of Lading Act 1855. The said section reads as follows:

Consignees and endorsees of bills of lading empowered to sue

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

A It is obvious therefore that the plaintiffs as consignees and endorsees of the bill of lading and as owners of the cargo of Chinese yellow maize, are entitled to sue the defendants for breach of the contract of carriage.

The cargo

B On or about 4 November 1992, the plaintiffs contracted with one Sinotrad Pte Ltd by way of contract No SD 225/1192 for the purchase of the cargo in bulk and paid a sum of US$1,559,293.50 on 23 March 1993. All these facts were unchallenged. I therefore find as a fact that the plaintiffs had acquired the title and property to the cargo on board the MV Gang Cheng C and thus became the owners after payment of the purchase price.

Port of loading, Dalian, China

The cargo was loaded at Dalian, China, on 19 March 1993 on board the MV Gang Cheng. The bill of lading which was an agreed and admitted D document by both parties had endorsed on it as the shipper's description of the goods the words:

CLEAN ON BOARD
FREIGHT PREPAID

E Such an endorsement to my mind is clear indication that at loading, the cargo was in good condition. Although the bill of lading gave the date as 19 March 1993, the Deck Log Book of the MV Gang Cheng showed that loading began on 14 March 1993 and was completed on 19 March 1993.

The inspection certificates issued by the relevant Chinese authorities F showed that:

(1) 13,147.50 metric tons of Chinese yellow maize were loaded on board the MV Gang Cheng.

(2) The moisture content of the cargo was 13.8%.

G The phytosanitary certificate issued by the Ministry of Agriculture of PR China gave clearance for the importation of the cargo by certifying that the said cargo conformed 'with the current phytosanitary regulations of the importing country'.

In the absence of any successful challenge to these facts, I accept these as representing the true picture. The cargo was stored in Hold Nos 1, 2, H 3, 4 and 5.

The voyage

The MV Gang Cheng with the said cargo in good order and condition left I the port of Dalian on 20 March 1993 heading towards Kuantan, Malaysia. This was a Saturday.

Since the Master of the ship was not called, the only evidence that the court can rely on in respect of the voyage was from the record found in the Deck Log Book ('the log'). Before I overlook this fact, it is relevant for me to make mention of the fact that no evidence was led as to why the Master

of the MV Gang Cheng was not called to testify. Instead, the court was informed that the Chief Deck Officer had refused to attend court. It will become abundantly clear that if either the Master or the Chief Deck Officer of the ship had testified, this court would have been appraised of many relevant facts. As it is, I had to rely on the log.

Getting back to the voyage, the log shows that on Sunday, 21 March 1993 the Cargo Hold Nos 1, 2, 3, 4 and 5 were all ventilated. However, on this date, there is this entry under 'Records of Important Events':

> The policy of ventilation of goods is to introduce ventilation to the goods. From Dalian to Singapore, ie from low temperature zone to high temperature zone. Generally, there is no need for ventilation. During ventilation should check the temperature of the exposure part of the internal and external of the hold.

I therefore find as a fact that despite this entry all the cargo holds were ventilated. The log entry for the next day, that is, Monday, 22 March 1993, showed that at least for 8 hours there was rain recorded between 1600 hours and 2400 hours.

At Kuantan Port

The MV Gang Cheng arrived at Kuantan Port on 30 March 1993 and unloaded part of its goods from Holds 1 and 5. The unloading began at about 1715 hours of the same day. Rain was again recorded on 3 April 1993 after the MV Gang Cheng had arrived at Kuantan Port and after the discharge of the cargo had begun but certainly before the discharge of the cargo was completed which was on 5 April 1993.

PW2, Lim Soon Lai, was the purchasing officer of the plaintiffs and he was waiting at Kuantan Port on 30 March 1993 to receive the cargo.

Seaworthiness of the MV Gang Cheng

According to PW2, when he first saw the said ship, it looked very rusty. There was hardly any paint remaining. He testified that the hatch covers of the said ship were rusty and particularly the hatch coamings were severely corroded. He noticed that the gaps between the pontoons of the hatch covers were taped with some kind of tape. He said that the Chief Deck Officer had ordered his crew to open hatch cover Nos 1, 3 and 5. He noticed that the crew removed the tape along the gaps between the pontoons of the hatch covers and then switched on the motor which retracted the pontoons of the hatch covers which were of the McGregor type. This evidence of PW2 relating to the condition of the ship has, to my mind, been amply corroborated by the agreed and admitted photographs produced of the MV Gang Cheng which were taken and set out in the survey reports of Caleb Brett and included in the common agreed bundle of documents ('CABD').

Further, not all the cranes on board the MV Gang Cheng were serviceable. In fact in the statement of facts signed by the Captain of the MV Gang Cheng and dated 23 April 1993, there are entries for 16, 18, 20,

21 and 22 April 1993 to the effect that the cranes on board were out of order. In any case, there is evidence by way of invoice that the plaintiffs had to hire shore cranes from the Port Authority of Kuantan to unload the cargo.

Based on Caleb Brett's report

Based on Caleb Brett's report and as explained by PW3 (Captain Chan Peng Sum), I find that the general condition of the MV Gang Cheng was wanting. I accept PW3's evidence that the hatch covers were heavily rusted, pitted and indented with cross joint wedges unused and with housing missing. The hatch coamings were rusted and scored with rust stains indicating water seepage into cargo hold. He also found water at the bottom of the cargo hold with marks indicating the level of water ingress through two holes on tank top plating, that is the bottom of the hold. He also found the hatch covers badly rusted with the cleats missing. The cleats he found missing were the vertical cleats used to secure the hatch cover/pontoon to the hatch coamings to hold it down thereby compressing the rubber lining to make the hatch cover waterproof. The defendants had to use muslin tape to seal the gaps between the pontoons of the hatch covers. He found the rubber linings so hardened so as to render the hatch cover/pontoon unlikely to be waterproof. He also found the locking pin corroded and bent and the hatch cover indented. It was his evidence that the locking pins are at the opposite end to where the hatch covers/pontoons are stacked when opened. When closed, the hatch covers/pontoons are pulled forward over the hatch and are locked into position by the locking cleats at the other end and secured by the locking pins. If the locking pins are bent as was the case with the MV Gang Cheng, the entire hatch cover may move during the course of a voyage thus affecting the waterproof-integrity of the hatch cover. He also found the hatch coaming platforms in hatches 1 and 2 to be cut, bent and dented and the ventilator to Holds 1 and 2 was found to be badly rusted with many holes at the sides, top and bottom. This ventilator led directly down to the cargo hold below so that any water entering would run down directly into the cargo. I find that in normal conditions hatch covers do not require the use of muslin tapes.

The clear evidence of PW3 and the tell-tale photographs taken by the surveyors show a totally decrepit and derelict ship fit for the junk yard. I find that the MV Gang Cheng was a dilapidated piece of iron-mongery capable of self-propulsion but incapable of carrying a cargo. In fact it is my conclusion that the defects on the MV Gang Cheng are so apparent as to be visible from the photographs themselves, that any reasonable person would be able to conclude that the hatches' ability to keep water out was clearly compromised.

Condition of the cargo

PW2 testified that when Hold Nos 1 and 5 were first opened and unloading had begun, he noticed that the cargo appeared to be normal. However, when Hold No 2 was opened on 5 April 1993, PW2 noticed that the cargo

of maize appeared mouldy, dark and greenish indicating that it was damaged. He also testified that the maize did not appear to be 'free flowing' so that the sides of the depression on the cargo, made by the grabs, had not slipped down to the centre, as it normally would. As soon as he realized this, PW2 testified that he went to the warehouse to check on the part of the cargo already unloaded. He found the maize warm to the touch, mouldy and caked and some looking dark brownish. PW2 then protested to the Captain of the MV Gang Cheng and said that he did not want any more of the cargo in Hold No 2. As a result thereof, out of 4,000 metric tons meant for discharge at Kuantan Port, only a total of 3,498.04 metric tons were recorded as having been discharged. But the weigh-bridge figures show more accurately that only a total of 3,126.22 metric tons were actually discharged.

I accept fully the evidence of PW2. The defendants did not call any of their own surveyors or representatives stationed at Kuantan Port to rebut any of PW2's evidence.

Survey report by Caleb Brett

Caleb Brett, the surveyors for the plaintiffs conducted a survey of the cargo and the ship on 6 April 1993. Their report has been agreed to and admitted. Caleb Brett boarded the MV Gang Cheng at about 1100 hours on 6 April 1993, that is, about 3 hours before the vessel left Kuantan Port.

The plaintiffs called one Capt Chan Peng Sum ('PW3'). He was at one time a Lieutenant Commander of the Royal Malaysian Navy. Having obtained the Certificate of Service as a Master of Foreign-Going Vessel from the Board of Trade, London, which entitles him to be addressed as Master Mariner, and upon retirement, he became a marine surveyor. In the course of such employment, he had surveyed ships which had encountered damage to their cargoes, hull and machinery. After joining various other loss adjusters, he joined Caleb Brett as its Divisional Manager. Caleb Brett then prepared three survey reports, that is, one for the cargo discharged in Kuantan Port, the other for the balance of the cargo discharged at Port Klang and the last report was for the salvaged sale conducted in respect of the cargo which was found damaged.

Caleb Brett inspected cargo Hold No 2 when they boarded the vessel on 6 April 1993. They found the remaining maize in Hold No 2 slightly mouldy/cracking and emitting a slight odour. They also examined the maize found in the warehouse and also kept in 2 silos. The maize in the silos was found to be caking; the maize in the warehouse was warm, mouldy, discoloured and emitting foul smell. I find this evidence consistent with the evidence given by PW2.

On the Kuantan survey by Caleb Brett, I accept their report that 66.625 metric tons of the maize discharged at Kuantan Port was found to be damaged. I also accept their report that 1,500 metric tons of the maize that was discharged was partially damaged.

A Settlement with insurers

For the purposes of settling the plaintiffs' claim against their own insurers, a 50% allowance was given on the said 66.625 metric tons of maize found damaged and 35% allowance was given on the 1,500 metric tons of maize which were found to be partially damaged. The reduced compensation
B was accepted by the plaintiffs as a compromise so as to avoid protracted litigation with their insurers. The evidence to this effect led by Heng Gek Hwah ('PW1'), a Director and General Manager of the plaintiffs, was unchallenged by the defendants.

C *Partially damaged maize*

The defendants argued that by using grabs to discharge the cargo, the plaintiffs had caused the mixing of sound cargo with the damaged cargo. It was suggested that manual shovelling of the maize would have reduced or eliminated the possibility of mixing sound cargo with the damaged
D cargo. I accept PW2's evidence that no other alternative method of discharge of the cargo was available at Kuantan Port. In any case, whilst suggesting manual shovelling, the defendants led no evidence that this method was available. Even if such was available, I find, based on the evidence of DW1, the Director of Unispec Services Sdn Bhd engaged by the defence
E as their surveyors, that the use of manual workers would have increased the labour costs and the time for the discharge of the cargo, thus aggravating the loss rather than mitigating it.

Missing evidence from the defendants

F I note that the defendants did not call any witness to testify as to what occurred at Kuantan Port. Even their surveyors were not called upon to prepare any survey report. Significantly too, no statement of facts relating to the Kuantan Port was made available. The statements of facts are documents setting out what occurred when the ship was at port and the
G statements contained therein are authenticated by the Captain. Surprisingly, such a statement of facts for Port Klang was tendered. To my mind, these absences form a clear lacuna in the case for the defence.

From Kuantan to Port Klang

H From the records, I find that the MV Gang Cheng departed from Kuantan Port at about 1400 hours on Tuesday 6 April 1993. The MV Gang Cheng arrived at Port Klang on 8 April 1993 but was only berthed alongside Wharf No 25 North Port at 1600 hours on 16 April 1993. Also from the records I gather that the discharge of cargo at Port Klang commenced at about 2045 hours on 16 April 1993. No evidence was adduced by the
I defendants whether the muslin tapes which were used to seal the gaps between the pontoons of the hatch covers and which tapes were removed at Kuantan Port, were indeed again, for whatever it was worth, replaced for the onward journey to Port Klang. I also gather from the records that

the vessel encountered rain on 8, 9, 11, 12, 13 and 16 April 1993. Obviously on these occasions, further opportunity for rain water to get into the cargo has been provided.

As for the condition of the MV Gang Cheng, I find that there were no significant changes. The general condition was again found to be wanting. Caleb Brett's report showed that the tank top plating of Cargo Hold No 2 had two holes of approximately 1 cm and 2 cm in diameter. Below these two holes are the ballast tanks of the vessel. I find that there is every possibility that sea water taken into the ballast tanks may have flowed through to the cargo in Hold No 2. This is even so when compounded by the corroded floor of Cargo Hold No 2. All in all, the hatch covers of the five hatches were in deplorable condition. They were rusting and heavily corroded with many hatch cleats missing. Needless to say that these cleats are very important as they secure the hatch covers so as to prevent ingress of water into the hatches. In the midst of such dilapidation, it was of little wonder that in an act of desperation to keep out the water, the defendants had resorted to the use of the muslin tapes. I accept the evidence of PW3, Captain Chan, that if the hatch covers were in sound condition there was no need to resort to the use of the muslin tapes. No evidence was led to my satisfaction that the muslin tapes would have satisfactorily prevented water ingress into the hatches.

What is significant is the refusal by the Master of the MV Gang Cheng to submit to a request for a hose test which to my mind would have clearly shown the inadequacy of the use of muslin tapes to keep out the water. In fact I accept the evidence of PW5, Anthony Graham Scott, the plaintiffs' expert, who said that muslin tapes made of cotton has wide weaves. If that be the case, there is no way that muslin tapes could have prevented the ingress of water into the hatches.

Condition of the cargo at Port Klang

Caleb Brett's surveyors inspected the cargo on board the MV Gang Cheng on 16 April 1993 soon after she had berthed at Port Klang. Their report clearly states: 'Part of Bulk Maize near aft bulkhead from top layer was found wet stained mark, hatch cover found rusty'. The report stated that: 'Bulk maize top layer approx 2–3 feet down, from top layer of cargo found damp/mouldy/discoloured emitting slight sour smell'. A follow-up report on 20 April 1993 was as follows:

Hatch No	Remarks
1	A large portion of the bulk maize at lower layer was found to be warm/mouldy/discoloured/lumpy and emitting sour smell.
2	Bulk maize at lower layer of aft/centre section found to be wet approximately one metre in depth.
3	Bulk maize at lower layer of portside section found slightly darkened in colour.
4	Bulk maize at lower layer near hatch coaming found slightly darkened in colour and damp.

A	5	Bulk maize at lower layer found slightly discoloured otherwise in apparent good condition.

Whilst the defendants' surveyors did not conduct a survey on what occurred at Kuantan Port, their report concerning the Port Klang berthing did not in my view differ much from Caleb Brett's report. In fact, it is relevant for me to make mention of the fact that the defendants' surveyors' report stated that the cargo was mouldy in all the hatches 1 to 5 with some of the cargo discoloured. It is also relevant to note that even the defendants' surveyors' report at 2CABD 201 clearly indicated that the cargo in all five hatches was warm.

It is relevant to note that the experts called by the plaintiffs, whose evidence I totally accept, confirmed that warmth is a factor which is necessary for the germination of the spores of Aspergillus Flavus which in turn produces aflatoxins and further heat.

The chemist's reports

The chemist's reports on the condition of the cargo were submitted by both parties. The chemists themselves were offered as witnesses but neither party sought to cross-examine the witnesses.

The plaintiffs' chemist's report

The chemist, after analysing 4 samples of the cargo of maize discharged at Kuantan Port stated that the moisture content ranged from 14.85% to 16.3%. It must be noted that the moisture content certified when loading at Dalian, China, was 13.8% (see the certificate of inspection). The moisture content in accordance with the plaintiffs' contract of purchase of the cargo was stipulated at a maximum of 14.5%. It is obvious therefore that the samples of Chinese yellow maize discharged at Kuantan Port were found to have a moisture content above the maximum amount contractually allowed.

The chemist concluded that the said samples had been damaged by fresh water since the said samples did not show any significant amount of sodium chloride (salt).

From cargo discharged at Port Klang, the chemist took one sound sample of maize and ten 'wet' samples. The chemist opined that the moisture content of all the 'wet' samples had risen substantially. Samples from the upper stow contained 20.8% and 18.51% whilst samples from the lower stow were found to contain as much as 42.84% and 17%. The moisture content of samples from the lower stow of Cargo Hold No 2 was 42.84% and 0.2622% of sodium chloride was also found. The normal level of sodium chloride is 0.09%. Based on this, the chemist concluded that damage to the cargo in the lower stow of Cargo Hold No 2 was due to the ingress of sea water.

Aspergillus Flavus is the fungus that produces a type of toxin called aflatoxins. Incidentally aflatoxins were also found in the 'wet' samples. In

fact, 10 micrograms per kilogram of aflatoxins were found. I accept the fact that aflatoxins below 10 micrograms per kilogram cannot be detected.

Comparing the chemical analysis of the cargo of maize from both the plaintiffs' and the defendants' chemists, I find that there is not much of a material difference in their respective conclusions. Both analyses show that moisture in excess of the amount certified at the load port in Dalian and in excess of the maximum allowed, in the plaintiffs' contract, was found in some of the cargo. Aflatoxins were also in certain samples in quantities above the acceptable level. However, sodium chloride was found in some of the cargo giving rise to the belief that part of the cargo had come into contact with sea water. However, it is obvious and I so find that the part of the cargo of maize which could certainly have come into contact with sea water was the cargo at the bottom of Hold No 2, because of the two holes found at the bottom of the said hold, which is the roof of the ballast tanks.

The defence witnesses

In so far as the defence was concerned, none of the three witnesses they called had any personal knowledge of what happened on board the MV Gang Cheng during its voyage from Dalian to Kuantan and Port Klang.

Koh Kai Peng ('DW1') was the director of Unispec, the defendants' surveyors. I note with concern that DW1 never attended the MV Gang Cheng until 16 April 1993. In other words, he only boarded the said vessel after she had berthed at Port Klang. It is obvious therefore that he cannot testify as to the vessel's condition nor the condition of the cargo, when the vessel was at Kuantan Port. In the circumstances, his evidence with regard to the damaged cargo found in Kuantan is unacceptable. In any case, he admitted that he relied on the findings of the Caleb Brett surveyors.

With regard to his evidence concerning Port Klang, it was elicited under cross-examination that whilst he admitted he boarded the vessel on 16 April 1993, he also admitted leaving the vessel at about 7.00 pm, before the cargo was unloaded because the cargo was only unloaded at about 2045 hours. I have therefore to accept his report with trepidation and scepticism since clearly his report must have been confined to an inspection of the surface of the cargo holds before unloading. No evidence was also given with regard to the lighting conditions in the hold.

The second time DW1 boarded the MV Gang Cheng was on 21 April 1993, that is about five days after unloading had commenced. He also confirmed the existence of the two holes at the bottom of Cargo Hold No 2. In the circumstances, I have no hesitation in concluding that the ingress of sea water from the ballast tanks through these two holes caused the salt water to damage part of the cargo in Hold No 2.

Condensation

DW1 admitted that the cargo was damaged by both sea water and fresh water. However, it was his evidence that the damage caused by the fresh water was due to condensation.

A It is obvious that under cross-examination it became clear that DW1's estimation that condensation caused the fresh water damage, was pure conjecture. He never considered rain and did not even check to see if rain was encountered during the voyage. In any case, I have serious doubts as to the possibility of condensation causing the existence of fresh water because both the plaintiffs' and the defendants' witnesses had testified that B maize is a poor conductor of heat. In the circumstances, even assuming there was condensation, which I have rejected, such could have only occurred if there was excessive or extensive ventilation of the holds by the crew, for the warm moist tropical air to have been introduced into the cargo of cold maize to cause the condensation.

C DW2, Mohd Nor bin Ahmad, was the Claims Executive of Spica Services (M) Sdn Bhd, whose role was as investigators for the insurers. Under cross-examination, he confirmed that he had obtained the maintenance records of the MV Gang Cheng and that he had handed the same to the defendants' solicitors. After the matter was stood down for 10 D minutes and when he resumed his testimony, he backtracked on this evidence and said that neither had he seen the said records nor sent them to the defendants' solicitors. He maintained he was unable to get the said records. However, surprisingly the plans of the MV Gang Cheng were only discovered during the course of the trial, to be in the possession of the defendants' expert witness. They were by consent subsequently marked as E CABD 8. I find DW2 totally of no assistance.

At this stage, the parties each had their respective expert witness and since the defendants had relied on a plea of inherent vice of the cargo, I directed that in the circumstances it was appropriate for the defence expert to give his evidence first.

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Experts' evidence

The importance of expert evidence has been emphasised by the need to specifically provide for its acceptance pursuant to ss 45 and 46 of the Evidence Act 1950. Further emphasis is provided by O 40 r 1(1) of the G Rules of the High Court 1980 ('the RHC') which provides for the court to appoint an independent expert on the application of any party to inquire and report upon any question of fact or opinion not involving questions of law or of construction. The need for independence, forthrightness and honesty in the preparation of an expert's report cannot be over emphasised.

H Whilst it is only human that an expert might tend to favour the side that calls him as a witness, such leaning cannot be so open and biased as to arouse a clear accusation of partiality. A total refusal to accept the view point of the other without giving sufficient explanation for its rejection, again opens an expert to a criticism of bias. With these caveats imposed upon experts, I now review the evidence of the three experts called by I both parties.

The defence expert

The defence called one Captain Michael John Mann ('DW3'). He is a marine cargo surveyor and by consent parties agreed that he was an expert.

To a direct and pointed question as to whether he was an expert on maize and its properties, from the outset he became evasive. I gathered that he had experience relating to the carriage of maize on board and thus had acquired knowledge of 'some of its properties'. He admitted that he was not a scientific expert on maize and its properties. Under cross-examination, he admitted that if the Master of the MV Gang Cheng had found anything wrong with the cargo at the time of loading, he was duty bound under the charter party to reject the cargo.

DW3's evidence of the location of the MV Gang Cheng during the course of its voyage to Kuantan Port was also clearly incorrect. DW3 plotted the position of the vessel in relation to the weather charts which purported to indicate the position of the vessel as in high pressure zones. However under cross-examination, it became obvious that the time used by DW3 to work out the position of the vessel did not correspond with the time expressed in the weather charts. It was astounding to note that when the position was re-calculated in court, the position of the vessel as indicated in the weather charts clearly showed that the vessel was indeed in low pressure zones, and this was admitted by DW3. It is important to record verbatim the questions and answers relating to this:

Q: If the position of the vessel at 2.00 am is outside the high pressure area where you had originally indicated the position of the vessel, the position of the vessel will actually be in a lower pressure area?

A: Yes.

Q: Again agree that in lower pressure areas it is more likely to rain than in high pressure areas?

A: In some circumstances, yes. Generally correct.

In other words, it is clear on the admission of this witness, that rain is more likely to occur in low pressure zones.

This expert had worked out his calculations and plotted the position of the vessel to indicate that it was in high pressure zones. I cannot but hold that this was a deliberate attempt by this witness to mislead this court. A court relies on the expertise of such a witness and where the court finds that such a witness has deliberately set out upon a course of conduct that was intended to present a totally different picture from the truth, this court must show its total displeasure at such reprehensible conduct. I must say that if not for the exacting cross-examination, this court would not have known that a totally different and incorrect picture of where the vessel was at the material time had been presented. I hold this expert's conduct all the more reprehensible for falsely giving the impression that the vessel was in a high pressure zone where it was unlikely to rain, especially when he was in possession of the plaintiffs' expert's report which had indicated that the ingress of rain water had caused the damage to the cargo.

He also admitted under cross-examination that quite apart from what was actually recorded in the Deck Log Book, it was possible that the rain continued up to at least 2.00 am on 23 March 1993, indicating therefore that there was at least 10 hours of rain. He also reluctantly agreed that there were 6 days on which rain was recorded.

In respect of the MacGregor hatch covers, DW3 admitted that they are only effective if they are in good condition and that the use of muslin tape in this case could be for no other purpose than to keep out water.

On this admission and from the evidence available, I am able to conclude that the Master of the MV Gang Cheng must have been concerned with the ingress of water into the cargo holds and more so considering the deplorable condition of the hatch covers. Again reluctantly, DW3 admitted that some of the agreed photos show the absence of rubber seals on some of the hatch covers and needless to say these rubber seals were meant to prevent the ingress of water into the holds. He also conceded that there were about 10 days of rain recorded before the cargo was completely discharged at Port Klang. He was also forced to admit the inaccuracy of his report that there was limited rainfall, having regard to the recorded incidence of rain.

DW3 theorised that the cargo was damaged upon opening of the hatch covers in Kuantan Port on the basis that the cargo being cold, and when warm moist air was introduced, moisture thus had set in. I totally reject this theory. To my mind, if such a preposterous theory is to be accepted that would mean that this country would never be able at all to import any sound maize cargo from temperate lands. In any case, such a myth exploded in the face of the mythologist DW3 when it was pointed out to him that indeed 53% of the cargo on board the MV Gang Cheng was found to be sound.

There is one other piece of evidence that I must consider. There was an alleged publication from the United Kingdom Ministry of Agriculture produced by DW3 which gave the court the impression that that document had indeed emanated from the said Ministry. Only upon cross-examination it was shown that what was purported to have been an official publication from the Ministry of Agriculture was indeed an alleged reproduction of an alleged conversation between an unknown official in the Ministry and an alleged colleague of DW3. This was totally contrary to what was held out to the court as a formal publication from the Ministry of Agriculture relating to aflatoxins. DW3 was prepared to mislead this court by pretending that the said publication was a genuine authentic publication from the Ministry when it was far from it. In fact when court adjourned for the day, plaintiffs' expert had that very night sent a facsimile to the Ministry of Agriculture, Fisheries and Food Contaminants Division in Noble House, London, to one David Atkins who was at that time the Head of the Natural Toxicants Section of that Ministry, who confirmed by return facsimile that he had no knowledge of the alleged publication and that he did not believe that it had any official status. Indeed Dr Gerald Ayerst, the plaintiffs' expert took the stand and tendered the relevant facsimiles and when given the opportunity to explain, DW3 was unable to say anything. It is a shocking state of affairs that not only has this witness deliberately attempted to prevent the cause of justice he had also attempted to introduce false and uncorroborated evidence to twist the case to suit his cause. Having considered the entirety of DW3's evidence, I find that he was far from candid and was not a witness of truth.

Moisture migration

It would seem that the main theory proposed by DW3 was moisture migration. This, according to him, was the cause of the damage to the cargo. However, under cross-examination he admitted that such a conclusion as stated in his report was wrong. In their submission, the defence however maintained the stand that the damage to the cargo was caused by moisture migration from within the bulk of the cargo caused due to the inherent vice of the cargo. And again, relevance was placed on the evidence of DW3 although he had admitted that his view on this was wrong. Mr Arun for the defence made a proposition that the damage was caused either by the ingress of fresh and sea water into the holds or by moisture migration. I have no hesitation in finding from available facts that the damage was caused solely by the ingress of rain and sea water into the holds.

There is one other ground on which I find that the defendants have failed to make out a case of moisture migration. It is plain that the theory relating to moisture migration is a theory steeped in scientific study and clearly DW3 was not competent nor qualified to give evidence of any such scientific study. In any case having himself admitted that the conclusion in his report as to the cause of damage being due to moisture migration was wrong, there is therefore no evidence to support the theory any longer. Simply put, the defence theory of moisture migration had evaporated. I have no hesitation in accepting the evidence of Dr Gerald Ayerst ('PW5') whom I find was eminently qualified to give such scientific evidence on moisture migration and who stated that it was not possible for moisture migration to have caused the damage in this case.

Even if moisture migration was the cause of the damage to the cargo, which is not the case here, I cannot hold that moisture migration ought to be regarded as an inherent vice of the cargo inself. In *Soya GmbH Mainz Kommanditgesellschaft v White* [1983] 1 Lloyd's Rep 122 at p 126, Lord Diplock described inherent vice as follows:

> ... It means the risk of deterioration of the goods shipped as a result of their natural ordinary behaviour in the ordinary course of the contemplated voyage without the intervention of any fortuitous external accident or casualty.

In any event, it was not the cargo that was defective. At loading, the cargo was sound. To my mind, moisture migration is the exudation of moisture from within the maize to its exterior, as a result of something happening inside it. If this is moisture migration, then obviously it is a scientific evolvement, which ought to have been catered for by the shipowners so as to enable them to show that they had exercised due diligence to make the holds and all other parts of the MV Gang Cheng in which the cargo was carried, fit and safe for its transportation. This requirement is clearly embodied in art III r 1(c) which states that the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the holds, refrigerating and cool chambers, and all other parts of the

ship in which the goods are carried fit and safe for their reception, carriage and preservation.

The plaintiffs then called the first of its two experts.

AG Scott

Rather than repeat his entitlement to being called an expert, I need only state that Mr Arun for the defence conceded that Mr Scott was an expert but gave notice that he would challenge the ambit of his expertise. To summarise his evidence, he narrated the poor condition of the MV Gang Cheng, and its hatch covers. He also opined that the damaged cargo on board the vessel was caused by rain water getting into the cargo in the cargo holds through the hatch covers and sea water getting into the cargo at the bottom of Cargo Hold No 2 through two corroded holes. I hold that his evidence was not in any material aspect seriously challenged under cross-examination.

Dr Gerald Ayerst

The next and most important witness called by the plaintiffs was Dr Gerald Ayerst. The two material aspects of his evidence had been earlier dealt with by me, namely when he was called to show that the alleged publication from the Ministry of Agriculture which DW3 tendered, was not a true publication from the Ministry and when I dealt with his evidence regarding moisture migration. I have no hesitation in accepting his evidence.

Damages

PW1 gave evidence in respect of the damages suffered by the plaintiffs. It is surprising that no evidence was led by the defendants to suggest that the quantum of damages was otherwise than as adduced by the plaintiffs. The evidence of PW1 on this was never challenged to my satisfaction. I therefore accept the evidence on this.

In mitigation, the damaged cargo was sold for the salvage value of RM203,875.20. Evidence as to the value of the cargo, had it been sound was adduced and this averaged RM335.64 per metric ton. I accept the documentary evidence tendered in respect of this.

I assess damages as follows:

(1) The damaged cargo discharged at Kuantan Port amounted to a total of 1,566.265 metric tons (1.500 metric tons + 66.265 metric tons) and if sound, this would have had a value of RM525,701.18 at RM335.64 per metric ton.

(2) The damaged cargo discharged at Port Klang amounted to a total of 5,096.88 metric tons and if sound, this would have had a value of RM1,701,716.80 at RM335.64 per metric ton.

(3) Thus the total value of the damaged cargo discharged at Kuantan Port and Port Klang if sound, amounted to RM2,236,417.98.

(4) The salvage values of the damaged cargo were as follows:

(i) Kuantan Port: 66.265 metric tons at 50% market value, that is 66.265 metric tons x 50% x RM335.64 per metric ton — RM11,120.59

1,500 metric tons at 35% market value, that is 1,500 metric tons x 35% x RM335.64 per metric ton — RM176,211.00

Total salvage value of the damaged cargo discharged at Kuantan Port was RM187,331.59.

(ii) Port Klang: The total damaged cargo discharged was 5,096.88 metric tons which was sold at the salvage value of RM203,875.20.

The total salvage value of the cargo discharged at Kuantan Port and Port Klang was RM391,206.79.

(5) Therefore Sin Heng Chan's loss amounted to RM2,236,417.98 less RM391,206.79 thus amounting to RM1,845,211.19.

The total fees paid by the plaintiffs to Caleb Brett amounted to RM12,015.50 pursuant to the agreed invoices.

Therefore the total loss was RM1,845,211.19 + RM12,051.50, that is RM1,857,262.69.

The law

The Hague Rules

It is clear that the defendants as the owners of the MV Gang Cheng and as carriers of the plaintiffs' cargo have breached their obligations under the contract of carriage. They had failed to comply with the provisions of rr 1 and 2 of art III and r 1 of art IV. There was clear breach of r 1 in that I have found on the evidence that the MV Gang Cheng was not 'seaworthy'. Neither were 'the holds ... and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and presentation'. Article III r 1 of the Hague Rules is generally taken in its totality to require that a shipowner provide what is generally termed as a 'seaworthy' vessel and is understood to embrace the concept as it existed under the common law. In *The Good Friend* [1984] 2 Lloyd's LR 586, the court held that the undertaking of seaworthiness at common law included under cargoworthiness, an undertaking that the vessel should be reasonably fit to receive and carry the cargo and deliver it at the specified destination. If the vessel's condition was such that she was not reasonably fit for those tasks, the undertaking was broken.

It is my judgment that an undertaking that a ship is seaworthy is also a clear undertaking that the ship is fit to transport the cargo stated in the bill of lading. In other words, it is synonymous that an undertaking as to

A seaworthiness is an undertaking as to cargoworthiness. Since I had found the ship a dilapidated piece of ironmongery only capable of self-propulsion and unfit to carry the cargo it undertook to transport, the undertaking has been broken. From the facts in evidence it is clear that the MV Gang Cheng was not seaworthy before and at the beginning of the voyage in question in that its hatch covers were not capable of preventing the ingress of rain water and further its Cargo Hold No 2 had corroded holes directly above the ballast tanks. On this, it is pertinent to reproduce a passage from *The Christel Vinnen* [1924] P 208 at p 212 where Scrutton LJ said:

> The leak was through a rivet hole from which the rivet had dropped out. As there was no sign of straining on any adjacent rivets, I agree with the view of the judge below that the rivet was a defective rivet when the voyage started, and that, therefore, the ship was unseaworthy.
>
> The shipowner sued by the cargo owner for damage to the maize replies that he is protected by the exceptions: 'damage occasioned by a latent defect in the hull ... even where occasioned by the negligence of the servants of the shipowner'. It is clear law that exceptions do not apply to protect the shipowner who furnishes an unseaworthy ship where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the implied warranty of seaworthiness. *Owners of Cargo on board SS Waikato v New Zealand Shipping Company* [1899] 1 QB 56 at p 58 is an instance of ambiguity defeating the shipowner's probable intention: see the judgment of Collins LJ. In *The Cargo ex Laertes* 12 PD 187, the words which protected the shipowners were 'latent defects in machinery even existing at the time of shipment'.

In respect of r 2, there was clear breach in the defendants' failure to properly and carefully stow, carry, keep and care for the cargo carried on board the MV Gang Cheng such that it would not have been damaged by the ingress of either rain or sea water.

Since no crew member was called, nor the captain nor any of its officers, I draw the irresistible conclusion that it was probably the case that there was nothing the crew could do to prevent the damage caused because of the unseaworthiness of the MV Gang Cheng. The futile attempt to use muslin tapes proved ineffective.

Coming to r 1 of art IV, the onus is on the defendants to prove that they had exercised due diligence to render the MV Gang Cheng seaworthy within the meaning of the Rule. I find that on the contrary no evidence was tendered to show that due diligence was indeed exercised. As I had found earlier, none of the defence witnesses were ever on the voyage and thus able to give first hand information on the 'due diligence' practised by the defendants.

However, the defendants seek protection under r 2(m) of art IV which invokes the defence of inherent vice. Having pleaded reliance on this rule, I was surprised that no evidence was adduced by the defendants to set up any of the exculpatory provisions relied on and set out earlier. It is the case for the defence that where the exception relied upon is art IV r 2(m) (inherent vice), there is no requirement to show due diligence on the part of the defendants to make the vessel seaworthy or the cargo holds, cargo-

worthy. In any case, it is my judgment that even if any such evidence relating to the exculpatory provisions was proffered, the immunities provided under art IV of the Hague Rules will not help the defendants. These Rules will not apply if the defendants were in breach of art III r 1 of the said Rules. It was so held in *Maxine Footwear Co Ltd & Anor v Canadian Government Merchant Marine Ltd* [1959] AC 589 (PC) where at pp 602–603 it was the judgment of the court that:

> ... Article III r 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of art IV cannot be relied on. This is the natural construction apart from the opening words of art III r 2. The fact that that rule is made subject to the provisions of art IV not so conditioned makes the point clear beyond argument.

Bailment

The plaintiffs also relied on bailment as a cause of action. It is my view that they are entitled to do so on the basis of the defendants' (as shipowners/carriers) attornment as bailees of the cargo by their acknowledgement that the plaintiffs have title to the cargo and are entitled to its delivery. I can do no better to express the law on this than by borrowing the genius of Staughton LJ when he said in *The Gudermes* [1993] 1 Lloyd's Rep 311 at p 324:

> As we understand that doctrine, attornment by a bailee consists in an acknowledgement that someone other than the original bailor now has title to the goods and is entitled to delivery of them. There may be an attornment sub modo; in other words, the bailee acknowledges the right to delivery but only on terms. That a bailee will naturally do for his own protection in many instances. And if there is an attornment on terms, the new bailor can also rely on the terms if he wishes to do so.

In this case, there is evidence that the plaintiffs had paid for the said cargo. There is also evidence that the defendants had delivered the cargo to the plaintiffs albeit partly damaged. This, I find, is a clear attornment on the part of the defendants as bailees. Once a bailee relationship has been established, then it follows that the defendants owe a duty of care to the plaintiffs to deliver the goods on the same good order and condition as they were in, when received by the defendants. In fact, our ss 104 and 105 of the Contracts Ordinance 1950 clearly sets out the bailee's liability.

Section 104 reads:

> In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

Section 105 reads:

> The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104.

A The case oft quoted in respect of this is the Malaysian case of *Port Swettenham Authority v TW Wu & Co (M) Sdn Bhd* [1979] AC 580 where Lord Salmon said at p 588:

> Their Lordships consider that the onus is upon the defendants under ss 104 and 105 to prove that they had taken as much care of the plaintiffs' goods B as a port authority of ordinary prudence would, under similar circumstances, have taken of its own goods of the same bulk, quality and value as the 64 lost cases.

The Ordinance is now called the Contracts Act 1950 and the sections are the same. On this cause of action too, I find for the plaintiffs.

C Having thus decided for the plaintiffs, I make the following awards:

(1) RM1,857,262.69 or its equivalent in United States Dollars at the time of payment;

(2) interest at the rate of 8% pa from date of service of writ to date of judgment;

D (3) costs to be paid by the defendants to the plaintiffs; and

(4) on the issue of costs, I grant a certificate for two counsel pursuant to O 59 r 19 of the RHC given the complexities of this case.

Claim allowed.

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Reported by Jafisah Jaafar

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